No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,

Petitioners,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL PHYSICIANS ALLIANCE, AMERICAN ACADEMY OF NURSING, CENTER FOR AMERICAN PROGRESS D/B/A DOCTORS FOR AMERICA, AMERICAN NURSES ASSOCIATION, AND SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations of healthcare providers who share a profound concern that the increasing political interference with—and pretextual regulation of—their professions will harm patients. Although *amici* recognize that states have a legitimate role in regulating the provision of healthcare, they believe that recent laws have too often been motivated not by the promotion of health and safety, but by unrelated political and ideological priorities. Particularly when these laws burden constitutional rights, courts should require states to provide evidence that the laws, in fact, advance their purported objective of improving or protecting patient health. Otherwise, states will be emboldened to pass more laws that use "health and safety" as mere pretext for achieving unrelated goals.

- **The National Physicians Alliance ("NPA")** is a non-partisan, nonprofit organization with members from a wide range of medical specialties. The NPA recently co-authored a report, *Politics in the Exam Room:*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Supreme Court Rule 37.2(a) of intent to file this brief was provided to the Petitioners and the Respondents, and both have consented in writing to the filing of this brief.

A Growing Threat, on political interference with medical practice.

- **American Academy of Nursing** is a professional organization that applies nursing knowledge to advance health policy and practice.
- **Center for American Progress d/b/a Doctors for America** works with doctors and doctors-in-training in all 50 states to put patients over politics and to improve health across the country.
- **The American Nurses Association** represents registered nurses and advocates regarding health care issues affecting nurses and patients.
- **The Society for Adolescent Health and Medicine** is a multidisciplinary organization that promotes the health and well-being of adolescents and young adults through advocacy, clinical care, health promotion, health service delivery, professional development, and research.

Amici respectfully submit this brief in support of Petitioners.

SUMMARY OF ARGUMENT

Although states can regulate healthcare providers to promote health and safety, this power is increasingly being misused as a pretext to enact ideologically motivated laws that infringe on constitutional rights. For instance, "gag rules" that

prevent healthcare providers from sharing certain information with patients infringe on these providers' First Amendment rights and can bear no relation to health and safety. So-called "targeted regulations of abortion providers ('TRAP')" laws—like the Texas statute before this Court—are only the most visible symptom of this broader legal and policy problem. These laws purport to promote health and safety, but they are in fact intended and designed, for unrelated ideological reasons, to make it harder—or impossible—for abortion clinics to offer services.

To prevent this end-run around constitutional protections, courts must require some showing that a law or regulation that burdens constitutional rights on the grounds of health and safety actually advances its asserted justification. Importantly, *amici* are not suggesting that courts substitute their own judgment about the best means to promote health and safety for the judgment of legislators. But it is equally improper to treat "health and safety" as a talismanic phrase: Legislators should not be allowed to accomplish what would otherwise be prohibited simply by intoning it. Under this Court's decisions in *Roe* and *Casey*, states may not prohibit women from exercising their right to terminate a pregnancy prior to viability. But the Fifth Circuit's approach in this case would permit a state to enact increasingly restrictive and burdensome regulations on clinics until every clinic was forced to close, without ever having to show that these regulations actually promoted health and safety. Unjustifiably reducing the number of abortion providers to zero

has the same effect as banning abortion outright—the real-world consequences are the same.

For this reason, the admitting-privileges and ambulatory surgical center ("ASC") requirements at issue in this case would bring Texas a step closer to nullifying the constitutional rights guaranteed by *Roe* and *Casey*. Texas's claim that these requirements promote the health and safety of women is unsustainable. No evidence supporting this purpose was seriously considered by the state legislature; the district court correctly found that these restrictions in fact did not promote health and safety; and Texas has not imposed similar restrictions on much riskier procedures. The public statements of Texas officials also indicate that the true purpose of the law was to reduce the number of abortions by forcing clinics to close.

Because these restrictions place a substantial obstacle in the path of a woman seeking a lawful abortion in Texas, and because Texas cannot make any competent showing that these restrictions are designed to advance health and safety, they violate the Due Process Clause. Texas cannot be permitted to side-step the Constitution and this Court's rulings through pretext.

Accordingly, *amici* respectfully urge this Court to reverse the judgment of the Court of Appeals.

ARGUMENT

I. Evidence Shows That The Protection Of Health And Safety Is A Pretext For H.B. 2—Not Its Purpose Or Effect.

States have increasingly targeted healthcare providers with regulations that advance political or ideological goals unrelated to health and safety. In particular, laws commonly dubbed "targeted regulations of abortion providers ('TRAP')" have been enacted under the guise of promoting health and safety, even though their sole purpose and effect is to make it more difficult for women to exercise their right to an abortion.

H.B. 2 is such a law. *See* Act of July 12, 2013, 83d Leg., 2d C.S. (Tex. 2013) (the "Act"). It imposes a variety of requirements on abortion providers, including the two provisions at issue here: the "admitting-privileges requirement," Act § 2 (codified at Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A) (West 2015)); 25 Tex. Admin. Code §§ 139.53(c)(1), 139.56(a)(1) (West 2015), and the ambulatory surgical center ("ASC") requirement, Act § 4 (codified at Tex. Health & Safety Code Ann. § 245.010(a) (West 2010)); 25 Tex. Admin. Code § 139.40(b)–(e) (West 2015). These two requirements mean that (1) any doctor who performs an abortion must have admitting privileges at a hospital no more than thirty miles away; and (2) the facility in which the abortion is provided must meet the standards of an ASC. The only interest Texas asserts to justify these two requirements is its interest in promoting women's health and safety. *See* Senate Comm. on

Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1 (2013).

As explained below, evidence shows that these requirements are in fact designed not to promote the health and safety of women, but to advance unrelated ideological objectives. In *Casey*, this Court reaffirmed that the decision to end a pregnancy prior to viability is protected by the Due Process Clause. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). While states "may enact regulations to further the health or safety of a woman seeking an abortion[,] *[u]nnecessary health regulations* that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 878 (emphasis added). In order to root out pretextual laws that have the purpose and effect of impeding women from exercising this constitutional right, courts must require states to make some evidentiary showing that their restrictions effectively advance a valid state interest. *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (courts have "an independent constitutional duty to review [a legislature's] factual findings where constitutional rights are at stake").[2]

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[2] Ever since this Court recognized the constitutional right to end a pregnancy prior to viability, it has insisted that judicial review of restrictions burdening this right must be more than a rubber stamp of the legislature's stated reasons. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 195 (1973) (holding an accredited-hospital requirement unconstitutional because Georgia did not "prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy [the state's] health interests").

The "trust us" approach urged on this Court by Texas would give states a free pass to enact more ideologically motivated laws aimed at nullifying this Court's rulings in *Roe* and *Casey*.

Because Texas has failed to make any competent showing that the two requirements at issue promote women's health and safety, and because the evidence actually shows that they are motivated by ideological reasons unrelated to this asserted interest, this Court should reverse the judgment of the Court of Appeals.

A. The Legislative Record Shows That H.B. 2 Does Not Promote Health And Safety.

Texas's legislature did not determine, based on medical evidence, that H.B. 2 would promote health and safety. In fact, the only evidence offered by legislators in support of these restrictions was anecdotal and disconnected from the actual effects of the bill.

To begin, the analysis of H.B. 2 prepared by the Texas House Research Organization reflected minimal support for the two restrictions at issue. *See* House Research Org. Bill Analysis: Tex. H.B. 2 83d Leg., 2d C.S. (2013). The only support provided for the ASC requirement was a reference to the *illegal* abortions performed at a non-Texas clinic by Dr. Kermit Gosnell. *Id.* at 10. And the law's admitting privileges requirement was supported only by a conclusory statement that abortion providers "should be required to have admitting privileges at a nearby

hospital in case one of their patients suffers complications and needs to be hospitalized." *Id.*

The lack of any medical evidence in the House Research Organization's analysis was hardly surprising—the bill's supporters likewise did not present any medical evidence during the debates in the House or Senate. Rep. Laubenberg, the sponsor of H.B. 2, stated in a conclusory manner that it was "true" that abortion was subject to more complications, but she failed to reference any medical evidence to support her belief. *See* H.R. 83-2 Supp., 2d C.S., at S61 (Tex. 2013), *available at* http://goo.gl/dwUxB4. And the only evidence offered to justify the ASC requirement was a single anecdote about an incident in which emergency personnel were unable to enter a facility with a gurney. *See id.* at S115. By contrast, the need for either restriction was categorically disputed by Ellen Cooper, then the top compliance officer for the Texas Department of State Health Services, who testified as follows before the Texas Senate:

> SEN. WEST: So based on what the department has done as of today at least, you believe—the agency believes that there is an adequate infrastructure in place in order to maintain the health and well-being of women in the state of Texas, as it relates to abortion facilities?
>
> COOPER: Yes sir, that is correct.
>
> . . .

> SEN. ZAFFIRINI: Based on your inspections of abortion clinics are there any findings that would indicate that there is a problem with safety of the healthcare delivered in those facilities?
>
> COOPER: As with all of our facilities, we go in and we investigate should there ever be a report of a complaint or a concern. . . . Generally speaking, compared with the other facility types, I have not been aware of any particular concerns. I can say that.

Public Hearing on S.B. 1 Before the S. Comm. on Health and Human Servs., 83d Leg. 2d Sess. (Tex. 2013) (statement of Ellen Cooper), *available at* http://goo.gl/h8b0Pt (transcribed from recording, from 1:24:30).

Available data also reinforces Cooper's testimony regarding the safety of Texas's clinics. As discussed in more detail below, from 2009 to 2013, over 360,000 abortions were performed in Texas without a single reported death from abortion-related complications. *See* Tex. Dep't. State Health Servs., Vital Statistics Annual Reports (2009-2013), *available at* https://goo.gl/Ekc3vo (compiled from table 33). The majority of these abortions were performed in clinics. *See id.* (compiled from table 38) (from 2009-2013, about 83% of abortions were performed in an abortion facility and about 17% were performed in an ASC).

There was similarly no evidence to show that these restrictions were more appropriate for

abortions than for other minimally invasive procedures. During the floor debate, Rep. Howard asked whether abortions produced a greater number of medical complications than did other procedures performed in ASCs. Rep. Laubenberg responded that she was "not advised of that." H.R. 83-2 Supp., 2d C.S., at S60. After Rep. Howard asked why a surgery to help continue a pregnancy should face fewer restrictions than an abortion procedure, the following discussion ensued:

> LAUBENBERG: Because you are trying to continue the life and not abort the life.
>
> HOWARD: Well, what does that have to do with requiring different admitting privileges?
>
> LAUBENBERG: Because the abortion is a [sic] much more invasive.
>
> HOWARD: In what way?
>
> LAUBENBERG: That the life of the child is going to end.
>
> HOWARD: But that's the purpose of having a termination or abortion.
>
> LAUBENBERG: That's correct.

Id. at S61. These responses by Rep. Laubenberg indicate that, at least in her mind, the focus on abortion was motivated by a desire to target a procedure that caused the end of fetal life, not by a desire to make that procedure safer.

By contrast, the state legislators who opposed H.B. 2 based their arguments on a substantial body of medical evidence, including statements by leading national and local healthcare organizations, that the ASC and admitting privileges requirements would not promote women's health and safety. For instance, the national American Congress of Obstetricians and Gynecologists ("ACOG") published a letter stating that the "bills [were] not based on sound science, despite our efforts to provide the legislature with the best available medical knowledge." ACOG, *Ob-Gyns Denounce Texas Abortion Legislation* (July 2, 2013), *available at* http://goo.gl/9IHjHv. The Texas District American Congress of Obstetricians and Gynecologists added its opposition to "facility regulations that are more stringent for abortion than for other surgical procedures of similar low risk." Lisa M. Hollier, *Texas-ACOG Statement Opposing SB 5 (Hegar)/ HB 60 (Laubenberg)* (July 1, 2013), *available at* http://goo.gl/VOPQa5. And the Texas Hospital Association asserted that "a requirement that physicians who perform one particular outpatient procedure, abortion, be privileged at a hospital" was "not the appropriate way" to ensure high-quality care. Texas Hospital Association, *Statement of Opposition to Section 2 of the Committee Substitute for Senate Bill 5*, *available at* http://goo.gl/QubPiH.

Despite the best efforts of healthcare organizations and the opponents of H.B. 2, the state legislature did not seriously evaluate whether these restrictions would improve women's health and safety. The apparent failure to even consider medical evidence supports the conclusion that health and

safety was a pretext for the evident purpose of the law—to reduce the number of clinics performing abortions in Texas.

B. The District Court Correctly Found That H.B. 2 Does Not Promote Health And Safety.

After H.B. 2 was challenged in litigation, Texas had another chance to show that the law promoted women's health and safety, this time before the district court. Once again, it failed to do so.

As to the admitting-privileges requirement, the district court correctly found that Texas provided "no evidence of correlation between admitting privileges and improved communication with patient handoff or that a communication problem actually exists between abortion providers and emergency-room physicians." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 899 (W.D. Tex. 2013). The court also found "no evidence" that the stated concerns regarding "patient abandonment, hospital costs, and accountability were assuaged by requiring abortion providers to have [nearby] admitting privileges." *Id.* at 900; *see also Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014) (finding that "[e]vidence related to patient abandonment and potential improved continuity of care in emergency situations is weak in the face of the opposing evidence that such complications are exceedingly rare in Texas, nationwide, and specifically with respect to the Plaintiff abortion providers," and that the "burden imposed on the women of West Texas, El

Paso, and the Rio Grande Valley by the admitting-privileges requirement is not appropriately balanced by a credible medical or health rationale").[3]

As to the ASC requirement, the district court found that "risks are not appreciably lowered for patients who undergo abortions at [ASCs] as compared to nonsurgical-center facilities," and that "women will not obtain better care or experience more frequent positive outcomes at an [ASC] as compared to a previously licensed facility." *Lakey*, 46 F. Supp. 3d at 684. The court also observed that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." *Id.* Accordingly, the court found "no particularized health risks arising from abortions performed in nonambulatory-surgical-center clinics which countenance the imposition of the [ASC] requirement on the provision of all abortions." *Id.*

Therefore, even before the district court, Texas failed to present competent evidence that health and safety were anything but a pretext for the enactment of H.B. 2. *Cf. Planned Parenthood of Wis., Inc. v.*

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[3] Other courts have also rejected the claim that admitting privileges requirements targeting abortion providers promote health and safety. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015) ("The district court correctly found that there is no reason to believe" that "the health of women who have abortions is endangered if their abortion doctors don't have admitting privileges.").

Schimel, 806 F.3d 908, 916 (7th Cir. 2015) ("[A] statute likely to restrict access to abortion with no offsetting medical benefit cannot be held to be within the enacting state's constitutional authority.").

C. Texas Has Not Imposed Similar Restrictions On Riskier Procedures.

That the admitting-privilege and ASC requirements have not been imposed on much riskier outpatient procedures further demonstrates that the purported health and safety justification for H.B. 2 was but a pretext.

Abortion generally involves limited complications and minimal risk of death. *See generally* National Abortion Federation, *Safety of Abortion* (2006), *available at* http://goo.gl/MG7nh0 (hereinafter "NAF"). Nationwide, the mortality rate for abortion over the period 2008-2011 was 0.73 deaths per 100,000 procedures. *See* Karen Pazol, et al., *Abortion Surveillance—United States 2012*, Centers for Disease Control and Prevention (2015), *available at* http://goo.gl/1stIbH; *see also* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetricians & Gynecologists 215, 216 (2012) (calculating the risk of death resulting from an abortion as 0.6 per 100,000). To put this in perspective, "the risk of death associated with childbirth [is] approximately 14 times higher than that with abortion," and maternal morbidities are far more common after a live birth than after an abortion. Raymond & Grimes, 119 Obstetricians & Gynecologists at 216.

Abortions performed at various stages of pregnancy and by different procedures present a range of risks, but these risks are all exceptionally low. For example, in 1999, 88% of women who obtained abortions did so in the first trimester and, of these women, 97% reported no complications, while fewer than 0.5% had complications that required hospitalization or additional surgery. NAF at 1. In a more recent study of abortion complications, 0.16% of women receiving an abortion by uterine aspiration and 0.31% of women receiving a medication abortion experienced a serious complication requiring abortion-related surgery, hospitalization, or blood transfusion. *See* Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 175 (2015). Abortions performed in the second trimester or later, while slightly riskier than first trimester abortions, are still safe—only 0.41% of these procedures lead to adverse events requiring hospitalization or additional surgery. *Id.* In general, the vast majority of abortions are performed without any complications. *See id.* (calculating a 2.1% risk of complications and 0.23% risk of major complications for all categories of abortion procedure).

In Texas, the mortality rate from abortion is even lower than the national average. Between 2001 and 2013, there were 993,844 abortions performed and five reported deaths. *See* Tex. Dep't. of State Health Servs., Vital Statistics Annual Reports, *available at* https://goo.gl/Ekc3vo (compiled from table 33 for annual reports 2001-2013). This amounts to a mortality rate for abortion in Texas of approximately

0.50 deaths per 100,000 procedures. Moreover, in the five-year period from 2009 to 2013—the most recent years for which data are available—there were *no reported deaths* from abortion-related complications in Texas, despite the fact that over 360,000 abortions were performed. *Id.* Notably, the majority of abortions in Texas are performed in clinics, as opposed to ambulatory surgical centers (ASCs). *See id.* (compiled from table 38) (from 2001-2013, about 89% of abortions were performed in abortion facilities, compared to about 9% in ASCs). Most recently, in 2013, about 76% of all abortions were performed at abortion facilities. *Id.*

Of course, abortion is not risk-free—no medical procedure is. That said, it has a far lower mortality rate than many other common outpatient procedures—such as hysteroscopy,[4] colonoscopy,[5] gastric bypass surgery,[6] and total knee

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[4] Hysteroscopy involves inserting a thin tube into the vagina to examine the cervix and uterus. The procedure can be diagnostic or operative. *See What is Hysteroscopy?*, Cleveland Clinic, *available at* https://goo.gl/rVRiCr (last visited Dec. 22, 2015).

[5] Colonoscopy involves inserting a long flexible tube into the rectum to diagnose changes in the large intestine and rectum. *See Tests And Procedures: Colonoscopy*, Mayo Clinic, *available at* http://goo.gl/Wy4Pzd (last visited Dec. 22, 2015).

[6] Gastric bypass is a type of surgery designed to help patients lose weight. *See Tests And Procedures: Gastric Bypass Surgery*, Mayo Clinic, *available at* http://goo.gl/QJxzjD (last visited Dec. 22, 2015).

replacement[7]—and Texas does not explicitly require any of these other procedures to be performed by a physician with nearby admitting privileges or in a facility that meets the standards of an ASC.

Colonoscopy and hysteroscopy, in particular, are medical procedures that in relevant ways resemble first trimester abortion. All three are minimally invasive and present relatively low risks of complications. But the mortality rate for abortion, to take the higher number cited above, is 0.73 deaths per 100,000 procedures, while the rate is estimated at 2.4 deaths per 100,000 procedures for hysteroscopy and 6.7 deaths per 100,000 procedures for colonoscopy. *See Hysteroscopy*, World Laparoscopy Hospital, *available at* http://goo.gl/rx2gNK (last visited Dec. 22, 2015); Am. Soc'y for Gastrointestinal Endroscopy, *Complications of Colonoscopy*, 74 Gastrointestinal Endoscopy 745, 747 (2011) (stating that, among patients reporting colonoscopy-specific mortality, there were 19 deaths among 284,097 patients). The two more invasive procedures have even higher mortality rates—gastric bypass surgery has a rate of 100 deaths per 100,000 procedures, and total knee replacement has a rate of 252 deaths per 100,000 procedures. *See* Peter Benotti, et al., *Risk Factors Associated With Mortality After Roux-en-Y Gastric Bypass Surgery*,

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[7] Total knee replacement surgery involves "cut[ting] away damaged bone and cartilage from [the] thighbone, shinbone and kneecap and replac[ing] it with an artificial joint." *See Tests and Procedures: Knee Replacement*, Mayo Clinic, *available at* http://goo.gl/VOcmFK (last visited Dec. 22, 2015).

259 Annals of Surgery 123 (2014), *available at* http://goo.gl/sZOM9a (finding 158 deaths in a cohort of 157,559 patients); Linda P. Hunt, et al., *45-day Mortality after 467,779 Knee Replacements for Osteoarthritis from the National Joint Registry for England and Wales: An Observational Study*, 384 Lancet 1429, 1431 (2014) (finding 1183 deaths in a cohort of 467,779 patients, even after adjusting for age, sex, and comorbidity).

In sum, as compared to the risk of death from abortion, the risk of death is 3.3 times higher for hysteroscopy, 9.2 times higher for colonoscopy, 137 times higher for gastric bypass surgery, and 345 times higher for total knee replacement surgery. Yet *none* of these much riskier procedures have been subjected to restrictions akin to those imposed by H.B. 2, which, under Texas's law, only apply to abortions.

To be sure, state legislatures are entitled to regulate certain procedures more stringently than others. But when a state specifically imposes more exacting restrictions on one of the safest procedures, factors other than good-faith legislative judgment on health and safety grounds are likely at work.[8] And

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[8] *See Planned Parenthood of Wis.*, 806 F.3d at 915 (noting "the complete absence of an admitting privileges requirement for other clinical [i.e., outpatient] procedures including for those with greater risk than abortion is certainly evidence that the Wisconsin Legislature's only *purpose* in its enactment was to restrict the availability of safe, legal abortion in this State, particularly given the lack of any demonstrable medical benefit *(cont'd)*

when the restrictions on that much safer procedure burden constitutional rights, states must be required to make an evidentiary showing that their stated health and safety purposes are not merely pretextual. *See Gonzales*, 550 U.S. at 161–66.

Texas's assertion that H.B. 2 promotes health and safety lacks support on the record. The Fifth Circuit's failure to require any evidence to support this assertion, if not corrected, will embolden states to pass more pretextual laws that burden constitutional rights.

D. Public Statements From Texas Confirm That Other Political Objectives Motivated H.B. 2's Enactment.

The public statements of key Texas officials further reveal that the apparent purpose of H.B. 2 for many of its supporters was to pressure abortion clinics to close, to make abortions more difficult to obtain, and to evade this Court's rulings in *Roe* and *Casey*. To be sure, the statements of *some* supporters cannot necessarily be extrapolated to the motives of all legislators who supported the Act. Yet these statements are, at the very least, evidence of what many in the Texas legislature and Governor's office sought to accomplish by enacting H.B. 2.

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for its requirement either presented [to] the Legislature or to this court.") (alterations and emphasis in the original).

For instance, in December 2012, while addressing an anti-abortion rally, then-Governor Rick Perry highlighted his proposals for the 83rd Legislative Session. Among those proposals was a plan to regulate abortion clinics as if they were ASCs—a plan that would become H.B. 2. Governor Perry explained that his purpose in passing abortion-restrictive measures was "to make abortion, at any stage, a thing of the past." Laura Bassett, *Rick Perry: Banning Abortion is 'My Goal'*, HUFFPOST POL. (Dec. 11, 2012), *available at* http://goo.gl/zrQj0a. In articulating this goal, Governor Perry was careful to note that "[w]hile Roe v. Wade prevents [Texas] from taking that step, it does allow states to do some things to protect life if they can show there is a compelling state interest." *Id.* Governor Perry went on to clarify, however, that the compelling state interest he had in mind was "preventing the suffering of our state's unborn," and that his ultimate goal was to end abortion in Texas. *See id.* ("Again, the ideal world is one without abortion. Until then, however, we will continue to pass laws to ensure abortions are as rare as possible under existing law."); John Schwartz, *Texas Senate Approves Strict Abortion Measure*, N.Y. TIMES, July 14, 2013, at A18 (Governor Perry, after the passage of H.B. 2, stated that "[t]oday the Texas Legislature took its final step in our historic effort to protect life").

As S.B. 5, the nearly identical predecessor to H.B. 2, proceeded through the Texas Senate, officials continued to make statements that pointed to the law's apparent purpose. After intense debates in the Senate, then-Lieutenant Governor David Dewhurst

tweeted a photo of a map indicating all the abortion clinics that would close if the law went into effect. The map stated, "If SB5 passes, it would essentially ban abortion statewide." In Dewhurst's accompanying tweet he wrote, "We fought to pass SB5 thru the Senate last night, & this is why!" David Dewhurst (@DavidHDewhurst), TWITTER (Jun. 19, 2013, 7:41 AM), *available at* https://goo.gl/Zyg2mw. News outlets quickly reported Dewhurst's provocative, but candid, statement. *See* Becca Aaronson, *Dewhurst Tweet on Abortion Bill Raises Eyebrows*, TEX. TRIB. (Jun. 19, 2013), *available at* http://goo.gl/DB2A70. In the face of the ensuing controversy, Dewhurst quickly backtracked, stating: "I am unapologetically pro-life AND a strong supporter of protecting women's health. #SB5 does both." David Dewhurst (@DavidHDewhurst), TWITTER (Jun. 19, 2013, 10:06 AM), *available at* https://goo.gl/VeiAIv.

The purpose of H.B. 2 was made even more clear during the House debates. Several legislators openly acknowledged that women's health was a pretext for reducing the number of abortions in Texas. For instance, before the initial vote on H.B. 2, the House sponsor, Rep. Laubenberg, displayed a pair of baby shoes "to represent aborted babies who can't speak out against the procedure." David Saleh Rauf, Kolten Parker, & Jayme Fraser, *Abortion Bill Gets Initial OK in House*, HOUS. CHRON. (last updated July 10, 2013, 7:53 AM), *available at* http://goo.gl/kdwBmz. Opponents of H.B. 2 also openly discussed the real-world consequences of imposing these restrictions. Rep. McLendon observed, "you don't have to be a rocket scientist to know that if these clinics cannot

meet the standards of the bill, that the clinics will not be open." H.R. 83-3, 2d C.S., at 57 (Tex. 2013) (statement of Rep. McLendon), *available at* http://goo.gl/g62m35. The lone Republican to eventually vote against the bill, Rep. Sarah Davis, warned her colleagues: "[T]his body is getting ready to pass legislation that is unconstitutional. . . . [W]e are here and the nation is watching what we are doing today on the floor . . . . So, now is not the time to play political football with women. Now is the time to pass good policy." H.R. 83-2 Supp. at S27, S32 (statement of Rep. Davis), *available at* http://goo.gl/dwUxB4.

Public pronouncements by a bill's supporters and opponents are not always a dispositive determinant of the bill's purpose. But these statements are particularly probative here, because the record lacks evidence of the asserted health and safety benefits, and because similar restrictions were not extended to far riskier procedures. When the evidence and circumstances are viewed in their totality, no leap is required to conclude that H.B. 2 was not designed to advance health and safety, but instead to further an unrelated political goal—making abortions more difficult to obtain in Texas.

Because H.B. 2 does not further the legitimate interest of the state in advancing women's health and safety, and because it was not reasonable for the legislature to think that it would, it violates the Due Process Clause. This Court should reverse the Court of Appeals.

II. The Regulation Of Healthcare To Advance Unrelated Political Objectives Is A Legal And Policy Problem Not Limited To Abortion.

H.B. 2 and similar restrictions on abortion providers are a symptom of a broader, baleful legal and policy trend. States have increasingly regulated healthcare in a manner designed to advance ideological objectives unmoored from health and safety. These laws harm patients and often infringe on the constitutional rights of healthcare providers. And if this Court upholds the Fifth Circuit's judgment, more of them will be enacted.

For example, some states have enacted "gag rules" that prohibit healthcare providers from asking patients whether they own firearms. Several medical organizations, including the American Medical Association ("AMA"), have stated, as a matter of policy, that firearm-related deaths and injuries can be alleviated in part by providing patients—particularly children and their parents—information about firearm safety. *See* Prevention of Firearm Accidents in Children, AMA Policy H-145.990, *available at* https://goo.gl/4ueJPG (expressing support for "increasing efforts to reduce pediatric firearm morbidity and mortality by encouraging its members to . . . inquire as to the presence of household firearms as a part of childproofing the home"). Healthcare providers following this guidance could choose to ask patients, in the course of assessing various risk factors, about the presence of firearms in their homes.

Yet, in 2011, Florida enacted the Firearm Owners Privacy Act, which prevents healthcare providers from asking such a question, except when the "information is relevant to the patient's medical care or safety, or the safety of others." 2011 Fla. Laws 112 (codified at Fla. Stat. § 381.026(4)(b)(8)–(11) (2014 & Supp. 2015); § 456.072(1)(nn) (2007 & Supp. 2015); § 790.338 (2015)). But the purpose of asking about firearm ownership is to provide prophylactic safety advice—only in rare cases would a provider be able to claim that the question was concretely relevant to a specific case. Florida's law thus prevents providers from asking a question that the healthcare profession has deemed crucial to patient care, apparently because the legislature disagreed with the question on ideological grounds.

Another species of "gag rule" legislation prohibits healthcare providers who treat patients exposed to the chemicals associated with hydraulic fracturing ("fracking")[9] from disclosing the names of these chemicals to anyone, including the patients themselves. Pennsylvania,[10] Montana,[11] North

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[9] Fracking is "the injection of fluid into shale beds at high pressure in order to free up petroleum resources (such as oil or natural gas)." Merriam-Webster Dictionary, *available at* http://goo.gl/3KxemS (last visited Dec. 22, 2015).

[10] 58 Pa. Stat. and Cons. Stat. Ann. § 3222.1(10)-(11) (West 2015) (allowing health professionals to learn about the chemicals used in fracking but only after, "a verbal acknowledgment that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential").

Carolina,[12] and Tennessee[13] have all enacted such laws on the grounds that the chemicals used by fracking companies are protected trade secrets. But secrets or not, healthcare providers are required by their professional and ethical obligations to share information about the causes of a patient's condition with the patient and other healthcare professionals. *See* Lois Snyder, *Ethics Manual, 6th Edition*, American College of Physicians, 156 Annals Internal Medicine 73, 77 (2012), *available at* http://goo.gl/ZGA6GB ("Information should be disclosed to patients and, when appropriate, family caregivers or surrogates, whenever it is considered material to the understanding of the patient's

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[11] Mont. Admin. R. 36.22.1016(3) (2015) (allowing health professionals to learn about the chemicals used in fracking but "may not use the information for purposes other than the health needs asserted in the [written] statement of need, and may be required to execute a nondisclosure agreement").

[12] N.C. Gen. Stat. Ann. § 113-391.1(c)(2) (West 2015) (allowing health professionals to learn about the chemicals used in fracking but "[i]f confidential information is disclosed . [t]he owner of the confidential information may require a confidentiality agreement from the treating health care provider," which "may restrict the use of the information [and] provide for legal remedies in the event of a breach").

[13] Tenn. Comp. R. & Regs. 0400-53-01-.03(1)(f) (2015) (allowing health professionals to learn about the chemicals used in fracking but "[t]he confidentiality agreement shall state that the health professional shall not use the information for purposes other than the health needs asserted in the statement of need, and that the health professional shall otherwise maintain the information as confidential").

situation, possible treatments, and probable outcomes."); American Nurses Association, *Code of Ethics for Nurses with Interpretive Statements*, Section 1.4 (2015), *available at* http://goo.gl/AdJpKG ("Patients have the moral and legal right to determine what will be done with and to their own person; to be given accurate, complete, and understandable information in a manner that facilitates an informed decision . . . ."); *see also Bradshaw v. Daniel*, 854 S.W.2d 865, 872 (Tenn. 1993) (holding a physician has a duty to the patient's family members to warn them of the potential pathogen to which they had also been exposed).

Prohibitions on such disclosure force providers to face civil, or even criminal, liability—all as a consequence of statements made in the execution of their ethical and professional duties. *See, e.g.*, N.C. Gen. Stat. Ann. § 113-391.1(d) (West 2015) (making disclosure of chemicals to an unauthorized person a Class 1 misdemeanor); W. Va. Code R. § 35-8-10.1e (2014) (subjecting healthcare providers to possible legal action for violating a company's trade secret if the disclosure of information is deemed to have been for a reason other than diagnosis or treatment).

Both of these "gag rules" involve state legislatures using the regulation of healthcare to advance ideological interests unrelated to health and safety. By banning speech that would otherwise be related to patient treatment, these "gag rules" also infringe on healthcare providers' First Amendment rights to free speech. *See Wollschlaeger v. Governor of Florida*, 797 F.3d 859, 902 (11th Cir. 2015) (Wilson, J., dissenting) ("Regardless of whether we

agree with the message conveyed by doctors to patients about firearms, I think it is perfectly clear that doctors have a First Amendment right to convey that message.");[14] *see also generally* Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201 (1994).

If H.B. 2 is allowed to stand without any evidence that it promotes health and safety, states will be encouraged to enact other ideologically motivated laws that force healthcare providers, under the threat of sanctions, to violate their professional and ethical obligations.

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[14] On December 14, 2015, the panel in this case issued a superseding opinion for the second time, again inviting a dissent from Judge Wilson. *See Wollschlaeger v. Governor of Florida*, No. 12-14009, 2015 WL 8639875, at *3 (11th Cir. Dec. 14, 2015).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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